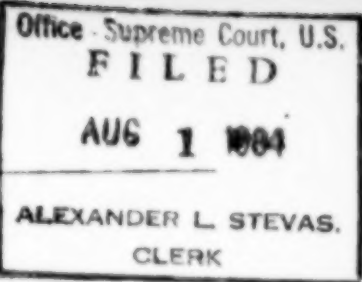


No. 83-2146



In The  
Supreme Court of the United States  
October Term, 1983

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RICHARD WILSON and MARTIN VIGIL,  
Petitioners,

vs.

GARY GARCIA,  
Respondent,

-----O-----  
BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

-----O-----  
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July 30, 1984

**BEST AVAILABLE COPY**

**QUESTIONS PRESENTED**

1. When a State's highest court determines a state limitations period for actions brought under 42 U.S.C. §1983 that discriminates against federal claims, such that federal claims will be barred, but equivalent state claims will not, or where the state limitations period is so short as to be unreasonable for bringing certain §1983 actions, is it improper for a federal Court to independently determine the appropriate state statute of limitations to be applied to an action brought in Federal Court under 42 U.S.C. §1983?
2. What are the criteria that the Federal Court should follow in determining the appropriate state statute of limitations

for an action brought in Federal Court under 42 U.S.C. §1983 where the state limitations period, as determined by the State Courts, discriminates against federal claims, or is unreasonably short?

# TABLE OF CONTENTS

	Page
Opinions Below .....	2
Jurisdiction .....	2
Constitutional Provisions and Statutes .....	3
Statement of the Case .....	4
Argument .....	11
1. Summary of the Argument .....	11
2. Reasons for Denying the Writ .....	13
A. The decision of the Tenth Circuit was correct and represents the fairest and most proper approach to characterizing federal civil rights actions .....	13
B. The New Mexico Tort Claims Act is inconsistent with federal law and it is not the most analogous state cause of action. ....	17
C. The New Mexico Tort Claims Act limitations period is inconsistent with federal law since it discriminates against federal claims. ....	25

## Page

D. The New Mexico Tort Claims Act 90-day notice provision which operates as a statute of limitations is inconsistent with federal law since it is unreasonably short .....	30
Conclusion .....	34
Appendix .....	App 1

## TABLE OF AUTHORITIES

Cases:	Pages
<u>Beard v. Robinson</u> , 563 F.2d 331 (7th Cir. 1977), <u>cert. denied sub nom., Mitchell v. Beard</u> , 438 U.S. 907 (1978) .....	21
<u>Board of Regents v. Tomanio</u> , 446 U.S. 478 (1980) .....	13
<u>Burnett v. Grattan</u> , ____ U.S. ____, 52 L.W. 4916 (1984) .....	12, 23, 26 30, 34
<u>Cameron v. City of Milwaukee</u> , 307 N.W.2d 164 (Wisc.Sup. Ct. 1981) .....	22
<u>Childers v. Independent School District No. 1 of Bryan County</u> , 676 F.2d 1338 (10th Cir. 1982) .....	33, 34
<u>Davis v. Murphey</u> , 559 F.2d 1098 (7th Cir. 1977) .....	22
<u>DeVargas v. State of New Mexico</u> , 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), <u>cert. quashed as improvidently issued</u> , 97 N.M. 563, 642 P.2d 166 (1982) .....	8, 19, 25 26, 27, 28 29, 30, 34

	Page
<u>Ferguson v. New Mexico State Highway Commission</u> , 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982) .....	32
<u>Garcia v. Wilson</u> , 731 F.2d 640 (10th Cir. 1984) .....	10, 11 17, 20
<u>Gomez v. Bd. of Education of Dulce</u> , 85 N.M. 708, 516 P.2d 679 (1973) .....	19
<u>Gonzales v. Stanke-Brown Assoc., Inc.</u> , 98 N.M. 379, 648 P.2d 1192 (Ct.App. 1982) .....	27
<u>Gunther v. Miller</u> , 498 F.Supp. 882 (D.N.M. 1980) .....	7, 8
<u>Hall v. Tawney</u> , 621 F.2d 607 (4th Cir. 1980) .....	28, 29
<u>Hansbury v. Regents of the University of California</u> , 596 F.2d 944 (10th Cir. 1979) .....	7, 28, 29
<u>Herrera v. Valentine</u> , 653 F.2d 1220 (8th Cir. 1981) .....	23
<u>Jacobs v. Stratton</u> , 94 N.M. 665, 615 P.2d 982 (1980) .....	19
<u>Johnson v. Davis</u> , 582 F.2d 1316 (4th Cir. 1978) .....	26

	Page
<u>Mt. Healthy City School District v. Doyle</u> , 429 U.S. 274 (1977) .....	28
<u>Occidental Life Insurance Co. v. EEOC</u> , 432 U.S. 355 (1977) .....	33
<u>Rice v. Sioux City Memorial Park Cemetery</u> , 349 U.S. 70 (1955) .....	27
<u>Smith v. Cremins</u> , 308 F.2d 187 (9th Cir. 1962) .....	15
<u>Smith v. Wade</u> , ____ U.S. ____, 103 S.Ct. 1625 (1983) .....	23
<u>Stengel v. Belcher</u> , 522 F.2d 438 (6th Cir. 1976), <u>cert. granted</u> , 424 U.S. 910, <u>cert. dismissed</u> , 429 U.S. 118 (1976) .....	21
<u>Wells v. Valencia County</u> , 98 N.M. 3, 644 P.2d 517 (1982) .....	18, 19, 20
<b>Constitutional Provisions and Statutes:</b>	
U.S. Const. Amend. IV .....	4
U.S. Const. Amend. V .....	4
U.S. Const. Amend. XIV .....	4
28 U.S.C. §1254(1) .....	3
28 U.S.C. §1292(b) .....	9



	Page
42 U.S.C. §1983 .....	passim
42 U.S.C. §1988 .....	3, 17
N.M. Stat. Ann. §37-1-4 (1978) .....	3, 8, 29
N.M. Stat. Ann. §37-1-8 (1978) .....	3, 11 25, 29
N.M. Stat. Ann. §41-4-12 (1978) .....	3, 20, 21 22, 23, 31
N.M. Stat. Ann. §41-4-15 (1978) .....	3
N.M. Stat. Ann. §41-4-15(A) (1978) .....	7, 18, 24 26, 27, 31
N.M. Stat. Ann. §41-4-16 (1978) .....	3, 31
N.M. Stat. Ann. §41-4-16(A) (1978) .....	31, 32
N.M. Stat. Ann. §41-4-16(B) (1978) .....	32
N.M. Stat. Ann. §41-4-16(C) (1978) .....	32
N.M. Stat. Ann. §41-4-19 (1978) .....	3

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BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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Respondent Gary Garcia respectfully  
requests The United States Supreme Court to  
deny the Petition for Writ of Certiorari to  
review the judgment and opinion of the United

States Court of Appeals for the Tenth Circuit entered in this case on March 30, 1984.

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#### OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (en banc) is reported at 731 F.2d 640 (10th Cir. 1984). The opinion of the Federal District Court of New Mexico is not reported. Both opinions are found in the Appendix to the Petition for Writ of Certiorari at pages App. 1 and App. 28, respectively.

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#### JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 30, 1984. The Petitioners have invoked the

jurisdiction of this Court under 28 U.S.C. §1254(1).

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#### CONSTITUTIONAL PROVISIONS AND STATUTES

The Petition involves consideration of the following statutory provisions: 42 U.S.C. §1983, 42 U.S.C. §1988, N.M. Stat. Ann. §37-1-4 (1978), N.M. Stat. Ann. §37-1-8 (1978), N.M. Stat. Ann. §41-4-12 (1978), N.M. Stat. Ann. §41-4-15 (1978), N.M. Stat. Ann. §41-4-16 (1978), and N.M. Stat. Ann. §41-4-19 (1978). The full text of each of these statutes, with the exception of N.M. Stat. Ann. §§41-4-16 and 41-4-19 (1978), is set forth in the Appendix of the Petition for Writ of Certiorari. The full text of N.M. Stat. Ann. §§41-4-16 and 41-4-19 (1978) is set forth in the Appendix to this Brief.

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### STATEMENT OF THE CASE

The Respondent, Gary Garcia, filed a lawsuit, in the United States District Court for the District of New Mexico, under 42 U.S.C. §1983 against Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, the then Chief of the New Mexico State Police, in their individual capacities. He seeks money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and for the severe personal injuries he suffered as a result of the acts and omissions of the Petitioners acting under color of law. The Complaint specifically alleges that Petitioner Wilson unlawfully and "brutally and viciously" beat Respondent with a "slapper," and thereafter sprayed tear gas in

the face of Respondent. The Complaint also alleges that Petitioner Vigil improperly allowed Petitioner Wilson to be hired as a New Mexico State Police Officer because, prior to his employment with the New Mexico State Police, Petitioner Wilson had been convicted of a variety of serious criminal offenses in several states, and there were arrest warrants outstanding against Petitioner Wilson in the states of Minnesota and North Dakota and that these facts were known by, or should have been known by, Petitioner Vigil. The Complaint further alleges that, prior to Petitioner Wilson's employment with the New Mexico State Police, Petitioner Vigil had received information that Petitioner Wilson had been fired for stealing from a former employer, and that Petitioner Vigil had been advised by two high-ranking New Mexico State Police



Officers, who had investigated Petitioner Wilson's employment application with the New Mexico State Police, that Petitioner Vigil should not hire Petitioner Wilson as a New Mexico State Police Officer. The Complaint alleges that the conduct of Petitioner Vigil, in allowing Petitioner Wilson to be hired as a New Mexico State Police Officer, directly caused the injuries and violations of the civil rights suffered by the Respondent.

The Complaint also alleges that Petitioner Vigil failed to properly and adequately discipline, train and control Petitioner Wilson, thereby directly causing the injuries and violations of civil rights suffered by the Respondent.

The incident in question in this case took place on April 27, 1979. In the Complaint it is alleged that the incident of April 27, 1979, involving Respondent and

Petitioner Wilson, occurred just four days after Petitioner Wilson viciously assaulted two women, and several months after Petitioner Wilson had physically abused another citizen, and that Petitioner Vigil was placed on notice of the violent propensities of Petitioner Wilson. The Complaint further alleges that Petitioner Vigil did not suspend, or take disciplinary, or any other action, against Petitioner Wilson.

This lawsuit was timely filed on January 28, 1982, pursuant to Gunther v. Miller, 498 F.Supp. 882 (D.N.M. 1980) and Hansbury v. Regents of the University of California, 596 F.2d 944 (10th Cir. 1979). The Petitioners filed a Motion to Dismiss claiming that the two-year statute of limitations contained in the New Mexico Tort Claims Act, N.M. Stat. Ann., §41-4-15(A), 1978 (hereinafter

"NMTCA") barred the filing of Respondent's Complaint.

Approximately one month after the filing of the Complaint, the New Mexico Supreme Court entered its decision quashing certiorari in DeVargas v. State of New Mexico, 97 N.M. 563, 642 P.2d 166 (1982) and without analysis or characterization of the claim, erroneously stated that the NMTCA two-year statute of limitations should apply to §1983 actions. On July 21, 1982, the Honorable Howard Bratton, Chief Judge, filed his Opinion and Order denying the Motions to Dismiss and holding that the appropriate New Mexico statute of limitations for §1983 actions was the four-year general statute of limitations contained in §37-1-4, NMSA 1978. Gunther v. Miller, 498 F.Supp. 882 (D.N.M. 1980). Chief Judge Bratton then entered his Order certifying an immediate interlocutory

appeal on the statute of limitations issue to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 U.S.C. §1292(b). On January 6, 1983, the Tenth Circuit granted Petitioners permission to appeal from Chief Judge Bratton's Order on the statute of limitations issue.

The cause was argued and submitted to a three-judge panel on March 7, 1983. The submission Order was vacated on May 23, 1983, and on the Court's own motion, the appeal was submitted to the full Court for an en banc determination. Thereafter, the Tenth Circuit posed a series of questions to counsel in a number of pending cases from the several states within the Circuit seeking supplemental briefs regarding the criteria for selection of the appropriate state statute of limitations to be applied to cases brought under 42 U.S.C. §1983. Oral argument

was held before the Court en banc on October 11, 1983.

On March 30, 1984, the Tenth Circuit, sitting en banc, issued its Opinion and Order of Judgment. Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984). In its Opinion, the Court determined that the Complaint in this case was timely filed. The Court further determined that, in the Tenth Circuit, henceforth, all §1983 claims will be uniformly characterized for statute of limitations purposes as "an action for injury to personal rights" rather than in terms of the specific facts generating a particular suit.

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## ARGUMENT

### 1. SUMMARY OF THE ARGUMENT

The Tenth Circuit Court of Appeals (en banc), after giving full consideration of the issues and undertaking an exhaustive analysis of the applicable law, unanimously ruled that §1983 actions are best characterized as actions for injuries to personal rights. Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir. 1984) (en banc). The Tenth Circuit correctly decided that this §1983 action was timely filed and that the appropriate limitations period is that found in N.M. Stat. Ann. §37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years."

The NMTCA statute of limitations, urged by the Petitioners, does not provide the most closely analogous New Mexico State cause of



action to one brought under 42 U.S.C. §1983. Moreover, the NMTCA limitations period is inconsistent with federal law. The two-year limitations period of the NMTCA, N.M. Stat. Ann. §44-4-15(A) (1978) discriminates against federal claims, such that a federal claim would be time barred, while an equivalent state claim would not. The NMTCA also contains a 90-day notice provision which operates as a statute of limitations. This 90-day notice provision is so short as to be unreasonable and inconsistent with federal law. Therefore, the NMTCA limitations period was properly disregarded by both the Tenth Circuit (en banc) and the Federal District Court. Burnett v. Grattan, \_\_\_ U.S. \_\_\_, 52 L.W. 4916, 4919 (1984). The decision of the Tenth Circuit was correct and represents the fairest and simplest approach to characterizing federal civil rights actions.

## 2. REASONS FOR DENYING THE WRIT

- A. The decision of the Tenth Circuit was correct and represents the fairest and most proper approach to characterizing federal civil rights actions.

The approach adopted by the Tenth Circuit (en banc) below is the most direct and proper method for determining the appropriate state statute of limitations to be applied in §1983 litigation. The characterization of §1983 claims as "actions to recover for injury to personal rights," 731 F.2d at 651, is supported by federal law. This manner of characterization allows for uniformity within the particular states in the Circuit, but does not create the nationwide uniformity rejected in Board of Regents v. Tomanio, 446 U.S. 478, 489 (1980). Any result, other than the one reached below, will continue to lead to confusion or chaos



in the Tenth Circuit. The Court would have to continue to confront a myriad of §1983 statute of limitations problems from each of the several states within the Circuit. Needless to say, this litigation on collateral issues wastes judicial resources.

The desirability of uniformity within the Tenth Circuit is self-evident. Litigants will now have settled expectations regarding the statute of limitations that will be applied to federal civil rights actions. Reference will be made to state law to determine the statute of limitations which applies to injuries to personal rights. There will no longer be the inevitable battles between litigants over the characterization of the action based upon the underlying conduct of the defendant. As aptly noted by Chief Judge Bratton of the New Mexico Federal District Court:

Attempting to characterize §1983 actions according to the underlying conduct of the defendant might well result in several different statutes of limitations being applied to §1983 actions in federal district court in New Mexico. Differing analogies would be drawn between §1983 actions and various state remedies, depending on the nature of the facts comprising the §1983 claim. Such a result would be highly unsatisfactory. As stated by the Ninth Circuit in Smith v. Cremins, 308 F.2d at 190:

Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action.  
(Petitioner's Appendix, p. 43)

The concerns of the Federal District Judges, who must regularly decide the

assorted federal civil rights statute of limitations questions, have been addressed by the Tenth Circuit (en banc). 731 F.2d at 649-650. Because of the reasonableness and fairness of the uniform characterization method adopted by the unanimous Tenth Circuit, it is highly likely that other Circuit Courts will utilize this approach. This Court should not grant the Petition for Writ of Certiorari at this time. Rather, the other Circuit Courts should be allowed the opportunity to consider the wisdom of the en banc decision below. As the law in this area develops, this Court will be in a better position to determine whether to exercise its certiorari jurisdiction.

B. The New Mexico Tort Claims Act is inconsistent with federal law and it is not the most analogous state cause of action.

The Civil Rights Act of 1871, codified in 42 U.S.C. §1983, does not contain a statute of limitations, but in 42 U.S.C. §1988, Congress instructs the Federal Courts to refer to state statutes when federal law provides no rule of decision. In Garcia v. Wilson, supra, the Tenth Circuit set forth the proper test in determining the most appropriate statute of limitations for §1983 actions:

The first step in selecting the applicable state statute of limitations is to characterize the essential nature of the federal action. [Citations omitted.] Characterization of such a federal claim is a matter of federal law. [Citations omitted.] The court must then determine which state limitations period is applicable to this characterization. [Citations omitted.] Although the federal courts are bound by the state's

construction of its own statutes of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a federal claim. [Citations omitted.]

731 F.2d at 642-643.

The Tenth Circuit correctly ruled that the two-year limitations period contained in N.M. Stat. Ann. §41-4-15(A) of the NMTCA is not the controlling limitations period for §1983 actions. 731 F.2d at 651, n. 5. The NMTCA does not provide an analogous cause of action because the express language of the NMTCA indicates that tort actions are separate and apart from actions for the redress of federal constitutional rights such as are available under §1983.

The New Mexico Supreme Court, in an opinion which examined the difference between a cause of action under the NMTCA and a §1983 action, stated that "the New Mexico Legislature recognizes that a tort is

separate and distinct from a constitutional deprivation." Wells v. Valencia County, 98 N.M. 3, 6, 644 P.2d 517, 520 (1982). The opinion in Wells is totally inconsistent with the prior statements of the New Mexico courts in DeVargas v. State of New Mexico, 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), cert. quashed as improvidently issued, 97 N.M. 563, 642 P.2d 166 (1982), and the position asserted by the Petitioners regarding the applicable statute of limitations for §1983 actions. Possibly, the confusion of the New Mexico Supreme Court, in analyzing the nature of a §1983 action, stems from the almost total lack of experience that Court has had with §1983 actions. A review of the New Mexico Reports reveals that, during the thirty years prior to the DeVargas decision, the New Mexico Supreme Court decided a total of two §1983 cases--Gomez v. Bd. of Education



of Dulce, 85 N.M. 708, 516 P.2d 679 (1973), and Jacobs v. Stratton, 94 N.M. 665, 615 P.2d 982 (1980).

In reaching the conclusion that §1983 actions and Tort Claims Act actions are separate and distinct concepts, the New Mexico Supreme Court, in Wells, and Chief Judge Bratton in the Federal District Court below, in Garcia v. Wilson, supra (Petitioner's Appendix, p. 28), analyzed basically the same provisions of the NMTCA. Chief Judge Bratton observed that:

"[n]o intent to include §1983 actions within the meaning of the term 'tort' in the NMTCA can be fairly read into the NMTCA as it now stands."

Garcia v. Wilson (Petitioner's Appendix at 39)

See Wells v. Valencia County, 98 N.M. at 6, 644 P.2d at 520.

Section 41-4-12 of the NMTCA does not create the same cause of action as §1983.

Although §41-4-12 purports to waive immunity for law enforcement officers, that section of the NMTCA does not have the same breadth and scope as a §1983 action. The essential elements of a §1983 action are (1) the denial under color of law (2) of a right secured by the Constitution and laws of the United States. Garcia v. Wilson, supra. See also Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied sub nom., Mitchell v. Beard, 438 U.S. 907 (1978). Section 41-4-12 of the NMTCA does not provide a cause of action against a law enforcement officer who acts under color of law but outside the scope of the officer's employment. In fact, the NMTCA bars such an action by requiring the officers to act within the scope of employment as an element that must be proven under §41-4-12. Section 1983 provides a cause of action under these same



circumstances. See Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1976), cert. granted, 424 U.S. 910, cert. dismissed, 429 U.S. 118. The fact that an officer was acting outside the course and scope of his employment will be a defense to a Tort Claims Action, but it will not defeat a §1983 claim where the officer was acting under "color of law." This is so because "color of law" is a broader concept than "acting within the course and scope of employment." See Cameron v. City of Milwaukee, 307 N.W.2d 164 (Wisc.Sup.Ct. 1981) and Davis v. Murphey, 559 F.2d 1098 (7th Cir. 1977).

The action allowed by §41-4-12 of the NMTCA for Constitutional deprivations is very different from, and much more limited than, a §1983 action. The NMTCA has statutory limitations on damages and does not allow the

recovery of punitive damages.<sup>1</sup> However, Section 1983 serves basically two functions: (1) the prevention of the abuse of state power, and (2) the compensation of persons whose civil rights have been violated. Burnett v. Grattan, \_\_\_ U.S. \_\_\_, 52 L.W. 4916 (1984); Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981). There is no statutory limitation on the amount of damages an injured party can be awarded in a §1983 action. In addition, punitive damages are allowed to be awarded in §1983 actions under proper circumstances. See Smith v. Wade, \_\_\_ U.S. \_\_\_, 103 S.Ct. 1625 (1983). It is, therefore, obvious that §41-4-12 of the NMTCA is not the most analogous state cause of

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<sup>1</sup>§41-4-19(A) of the NMTCA provides a limitation on damages, and only covers a public employee who has acted within the scope of his duties. Section 41-4-19(B) precludes any award of punitive damages under the NMTCA.

action to a §1983 claim. Since that Section is not the most analogous state cause of action to a §1983 claim, §41-4-15(A) of the NMTCA, the two-year statute of limitations provision of the NMTCA, does not apply to §1983 actions.

Because of the correctness of the Tenth Circuit's decision to not apply the NMTCA limitation period, certiorari should be denied. The Tenth Circuit's approach to characterization will avoid the need to describe the federal cause of action in terms of state law as was done above. No longer will there be voluminous litigation that is collateral to the merits and that consumes scarce judicial resources. "All of the federal values at issue in selecting a limitations period for §1983 claims are best served by articulating one uniform characterization describing the essential

nature underlying all such claims." 731 P.2d at 650.

C. The New Mexico Tort Claims Act limitations period is inconsistent with federal law since it discriminates against federal claims.

The interpretation by the New Mexico Supreme Court, in DeVargas v. State of New Mexico, 97 N.M. 563, 642 P.2d 166 (1982), of the applicable New Mexico limitations period to be applied to a §1983 action, discriminates against federal claims, like the one at bar, such that federal claims will be time barred while equivalent state claims will not. In New Mexico, a litigant in an assault and battery case has three years to bring suit under N.M. Stat. Ann. §37-1-8 (1978). Yet, under the DeVargas decision, a civil rights claim alleging an atrocious and outrageous police beating must be brought within two years pursuant to N.M. Stat. Ann.

§41-4-15(A) (1978). This has the improper discriminatory effect of making the statute of limitations for a §1983 action shorter than the statute of limitations for personal injury. Burnett v. Grattan, \_\_\_ U.S. at \_\_\_, n. 15, 52 L.W. at 4919, n. 15 (1984); Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978) (rejecting Virginia's express one-year statute of limitations for §1983 actions as discriminatory against federal cause of action).

The Petitioners urge this Court to grant certiorari to adopt the discriminatory §1983 statute of limitations position of the New Mexico Courts. The opinion of the New Mexico Court of Appeals in DeVargas demonstrates a lack of understanding of the significant differences between a tort claims action and a §1983 action. In addition, the New Mexico Court of Appeals, in DeVargas, never held

that the controlling limitations period for §1983 actions brought in State Court in New Mexico is the two-year period set out in the NMTCA at §41-4-15(A). The New Mexico Court of Appeals made no choice, in DeVargas, regarding the appropriate statute of limitations to be applied to §1983 actions. 97 N.M. at 451, 640 P.2d at 1331.

The language regarding the two-year §1983 limitations period comes from the New Mexico Supreme Court decision quashing certiorari in DeVargas and is dicta. 97 N.M. at 564, 642 P.2d at 167. A decision quashing certiorari is of no precedential value and indicates nothing more than the reviewing Court's conclusion that the case "is not appropriate for adjudication." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (on rehearing); see also Gonzales v. Stanke-Brown Assoc., Inc., 98 N.M. 379, 648



P.2d 1192 (Ct.App. 1982) (Sutin, J., specially concurring). The New Mexico Supreme Court, in DeVargas, did not characterize §1983 actions. Rather, the Court, without any reasoned analysis or discussion, simply adopted the two-year limitation period in the NMTCA for §1983 actions. 97 N.M. at 564, 642 P.2d at 167. The New Mexico Supreme Court gave no consideration, whatsoever, to whether certain conduct, actionable under §1983, is even covered by the NMTCA. See, e.g., Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (substantive due process claim against school teacher); Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) (First Amendment); Hansbury v. Regents of the University of California, 596 F.2d 944 (10th Cir. 1979) (employment discrimination).

The decision of the New Mexico Courts in DeVargas, and urged by the Petitioners, has the effect of discriminating against a whole range of federal civil rights claims. For example, under DeVargas, a child brutally beaten by a school official, and therefore having a substantive due process claim against that official, see Hall v. Tawney, supra, must bring a §1983 action within two years, whereas a simple assault claimant has three years to bring suit under N.M. Stat. Ann. §37-1-8 (1978). A police officer who is the victim of wrongful termination due to protected First Amendment activity must bring his §1983 suit within two years while other victims of wrongful termination of employment have four years to bring suit under N.M. Stat. Ann. §37-1-4 (1978). See Hansbury v. Regents of the University of California, 596 F.2d 944 (10th Cir. 1979).



This Court has been steadfast in its opinion that a state limitations scheme must not discriminate against federal claims. For, as Justice Rehnquist noted:

Plainly, if the state statute of limitations discriminates against federal claims, such that a federal claim would be time barred, while an equivalent state claim would not, then state law is inconsistent with federal law.

Burnett v. Grattan, \_\_\_ U.S. \_\_\_  
(1984) (Rehnquist, J.,  
concurring opinion).

The decision by the Tenth Circuit (en banc) to disregard the DeVargas decision does not implicate any fundamental principles of federalism. A state statute of limitations should not be selected when it is inconsistent with federal law. The discriminatory impact of the NMTCA limitations period is inconsistent with federal law. This Court's decision in Burnett v. Grattan, supra, is controlling.

This case, therefore, is not an appropriate one for this Court to exercise its certiorari jurisdiction.

D. The New Mexico Tort Claims Act 90-day notice provision which operates as a statute of limitations is inconsistent with federal law since it is unreasonably short.

Another example of the derogation of rights a civil rights litigant has under the NMTCA is the requirement of notice provision contained within §41-4-16 of the NMTCA. This notice provision applies to the entire New Mexico Tort Claims Act, including §41-4-12, the law enforcement officers section, and §41-4-15(A), the two-year limitation period of the NMTCA. Section 41-4-16A requires a person claiming damages against the State or a local public body to give written notice of the claim to a specified governmental official "within ninety (90) days after an

occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act." Section 41-4-16B provides an absolute defense to a claim for damages under the NMTCA unless the requisite written notice has been given as required by §41-4-16A, or unless the governmental entity had actual notice of the occurrence. Section 41-4-16C lengthens the notice period to six (6) months in a wrongful death situation.

The New Mexico Courts have interpreted this notice provision as being in the nature of a statute of limitations. See Ferguson v. New Mexico State Highway Commission, 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982). Since the 90-day notice provision section applies to the entire NMTCA, the 90-day notice required by §41-4-16A is required even for constitutional deprivations. This Court has made it clear that the federal policy behind

the civil rights statutes must be considered when a choice is to be made among the various state limitation statutes.

"State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute."

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977)

In Childers v. Independent School District No. 1 of Bryan County, 676 F.2d 1338, 1343 (10th Cir. 1982), the Tenth Circuit stated that "a plaintiff seeking in federal court to vindicate a federally created right cannot be made to jump through the procedural hoops for tort-type cases that may have commended themselves to the legislative assemblies of the several

states." Burnett v. Grattan, \_\_\_ U.S. \_\_\_,  
 n. 9, 52 L.W. 4916, 4918, n. 9 (1984). The  
 90-day notice provision of the NMTCA,  
 interpreted as a statute of limitations bar,  
 is similar to the type of procedural hoop  
 condemned in Childers. The 90-day notice  
 provision is so short as to be inconsistent  
 with federal law. See Burnett v. Grattan,  
supra. The 90-day notice provision of the  
 NMTCA is another reason why the Tenth Circuit  
 was correct in refusing to follow the  
DeVargas decision and apply the NMTCA  
 limitations period scheme to §1983 actions.

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#### CONCLUSION

The decision below is correct. The  
 Petitioners have advanced no compelling or  
 persuasive reason supporting the relief they

request. Certiorari, therefore, should be  
 denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT



## APPENDIX A

N.M. Stat. Ann. Chapter 41 (1978)  
Torts

## §41-4-16. Notice of Claims

A. Every person who claims damages from the state or any local public body under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district for claims against the school district, the county clerk of a county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice

stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

C. When a claim for which immunity has been waived under the Tort Claims Act is one for wrongful death, the required notice may be presented by, or on behalf of, the personal representative of the deceased



person or any person claiming benefits of the proceeds of a wrongful death, action, or the consular officer of a foreign country of which the deceased was a citizen, within six months after the date of the occurrence of the injury which resulted in the death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

#### **§41-4-19. Maximum Liability**

A. In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], the liability shall not exceed:

(1) The sum of one hundred thousand dollars (\$100,000) for damage to or destruction of property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars (\$300,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage as permitted under the Tort Claims Act; or

(3) the sum of five hundred thousand dollars (\$500,000) for all claims arising out of a single occurrence.

B. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.